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Supreme Court of the United States

OCTOBER TERM, 1966.

No. 602

FEDERAL BARGE LINES, INC., and GULF-CANAL LINES, INC.,
Petitioners,

versus

ERNEST O. DEFFES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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FEDERAL BARGE LINES, INC., and GULF-CANAL LINES, INC.,
Petitioners,

versus

ERNEST O. DEFFES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners, Federal Barge Lines, Inc. and Gulf-Canal Lines, Inc. pray that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered in the above case on the 26th day of May, 1966 and the denial by said Court of Petition for Rehearing on July 6, 1966.

CITATIONS TO OPINIONS BELOW.

This case was tried on the merits to the District Court sitting without a jury and judgment was rendered against the plaintiff with written reasons. The opinion of the trial court is reported in 229 F. Supp. 719. The Court of Appeals for the Fifth Circuit reversed and remanded the judgment of the District Court with Judge Jones dissenting. The opinion of the Circuit Court of Appeals is reported in 361 F.2d 422 (5th Cir. 1966). A rehearing in the Circuit Court of Appeals was denied with Judge Jones again dissenting.

JURISDICTION.

The Judgment of the Circuit Court of Appeals was entered on the 26th day of May, 1966. Rehearing was denied on July 6, 1966.

Jurisdiction was vested in the United States District Court by virtue of 28 U.S.C. Section 1332 (a). The jurisdiction of this Honorable Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED.

(1) Is a vessel rendered unseaworthy by an allegedly defective land-based marine leg?

(2) Should an Appellate Court reverse judgment and remand case without further instructions as to findings required and as to indemnity?

(3) Should Appellate Court order the payment of attorney's fees and expenses for barge owner and charterer for the appeal?

STATUTES INVOLVED.

There are no express statutes involved and the case is submitted under the General Maritime Law.

STATEMENT.

The parties involved in this case are Ernest O. Deffes who sued Federal Barge Lines, Inc. and Gulf-Canal Lines, Inc., as owners and charterers of the Barge FBL-625 who in turn filed a third-party action against Continental Grain Company, the plaintiff's employer for indemnity and attorney's fees.

The plaintiff alleges that he was struck in the eye by a piece of metal from an allegedly defective marine leg which had been injected into the cargo of corn during the unloading procedures from the Barge FBL-625.

The Barge can be described as a "Hopper" type barge of steel-welded construction with steel rolling covers. The Barge was 195 feet in length and 35 feet in breadth. The Barge on this occasion was loaded with a cargo of corn, but was a general classification barge capable of carrying any type of solid cargo. The cargo of corn had been shipped by the Continental Grain Company from St. Paul, Minnesota to New Orleans, Louisiana under a freight

bill and bill of lading in which the Continental Grain Company was the shipper as well as the consignee. Under this type of arrangement, the movement of the cargo was on a free on and off basis whereby the shipper performs the loading and the consignee performs the unloading. The Barge arrived at the Federal Barge Lines, Inc. fleet location on the Mississippi River on May 9, 1960 and on May 27, 1960 the barge was moved to the Continental Grain Company dock also on the Mississippi River by a Point Landing tug which was called by the Continental Grain Company.

At the time of the alleged injury, the Barge FBL-625 was completely under the control of the Continental Grain Company unloading crew. The cargo of corn was unloaded from the Barge by means of a mechanical contrivance commonly termed a "marine leg". The base of the marine leg was firmly attached to the Continental Grain Company dock and was an integral part of the land-based conveyor system to the Continental Grain Company elevator. The plaintiff was a member of the Continental Grain Company unloading crew and was allegedly injured during the final stages of the unloading operation from the barge.

The case was tried to the District Court sitting without a jury on questions of negligence and seaworthiness.

The District Court rendered judgment in favor of the defendants and awarded attorney's fees in the

amount of $2,500.00 in favor of Federal Barge Lines, Inc. and Gulf-Canal Lines, Inc. against Continental Grain Company. An appeal was taken by the plaintiff on the merits and the Court of Appeals for the Fifth Circuit reversed and remanded the judgment of the District Court. The Fifth Circuit subsequently denied timely requests for a rehearing.

REASONS FOR GRANTING THE WRIT.

I. A Vessel Should Not Be Rendered Unseaworthy By Reason Of An Alleged Defect In A Land-Based Marine Leg.

The decision in the Fifth Circuit in the instant case is directly in conflict with the guidelines established in the cases such as *McKnight v. N. M. Paterson & Sons,* 286 F.2d 250 (6th Cir. 1960), cert. den. 368 U.S. 913; *Forkin v. Furness Withy & Co.,* 323 F.2d 638 (2nd Cir. 1963) and in the Eastern District of Louisiana, *Sherbin v. S. G. Embiricos, Ltd.,* 200 F. Supp. 874 (E.D. La. 1962). These cases would provide proper tests to be utilized in determining the applicability of the Unseaworthiness Doctrine. For instance, as Judge West pointed out in his Opinion in the *Sherbin* case, that the "rational stopping place" would be whether or not the defective equipment was a part of the "hull, gear, stowage, appurtenant appliances and equipment" of the ship. ID. 876-877.

This operation involving shore-based equipment should not affect a vessel and this is recognized by

Judge Jones in his dissenting opinion, *Deffes v. Federal Barge Lines, Inc.*, 361 F.2d at 427. It is submitted that an extension of the Admiralty Doctrine to this case would effectively supersede the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 et seq. In this regard, the Courts could well meet themselves coming from the other direction with such cases as *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114 (1962), wherein this Court clarified and extended the application of the Longshoremen's Act.

The Fifth Circuit, in effect, has found that whether or not the shore-based equipment was attached to the barge at the time of the alleged injury is of no consequence. Further, the question of whether or not the shore-based marine leg was a part of the hull, gear, stowage or appurtenant appliances of the barge or whether the equipment was traditionally the vessel's equipment is of no consequence. The Fifth Circuit has chosen to find that the Doctrine of Unseaworthiness concerning the Longshoremen-Admiralty remedies commencing with *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946) and its progeny should govern this case. The petitioners would submit, however, that such extensions of the Admiralty Doctrine would prevent uniformity in such cases. Further, such cases as *Huff v. Matson Navigation Company*, 338 F.2d 205 (9th Cir. 1964), cert. den. 380 U.S. 943 and *Spann v. Lauritzen*, 344 F.2d 204 (3rd Cir. 1965) cert. den. 34 L.W. 3201 relied upon by the Fifth Circuit are cases motivated by the dangerous con-

cept that "the end justifies the means". The *Spann, supra,* case would seem to say that anyone remotely involved with the loading or unloading process should be afforded the admiralty remedy. It is respectfully submitted that there should be some "rational stopping place" imposed and it is respectfully urged that this Court accept this Writ and prevent further encroachment in the Maritime Law.

II. Reversal Of Judgment By Appellate Court Should Contain Further Instructions As To Findings Required.

III. Reversal Of Judgment By Appellate Court Should Contain Directions As To Indemnity.

In the event that the reversal by the Fifth Circuit should remain in effect then further instructions concerning the remand to the District Court should be given in regard to findings of fact concerning the accident. As stated by Circuit Judge Barnes in his concurring and dissenting opinion in the *Huff* case:

> "The District Court has still to reach the fundamental question: whether the mechanical apparatus which was used in unloading was free from defects, and reasonably fit for its intended purpose.". *Huff v. Matson Navigation Company,* 338 F.2d 205, 218.

The reasonable fitness concept is of great importance in such matters. See, *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 550 (1960).

Petitioners further urge that for the remand to the District Court that instructions should be given

to the Court to apply indemnity in favor of petitioners. In that the Court's opinion finds that the marine leg made the barge unseaworthy, and the fact that the marine leg was owned and operated solely by Continental Grain Company, then the well-established theory of indemnity as expressed in *Ryan Stevedoring Co. v. Pan-Atlantic SS Corp.*, 350 U.S. 124 (1956) would be applicable. See also, *Crumady v. Joachim Hendrik Fisser*, 358 U.S. 423 (1959); *Italia Societa v. Oregon Stevedoring Co.*, 376 U.S. 315 (1964); *Mosley v. Cia. Mar. Adra, S.A.*, 362 F.2d 118 (2nd Cir. 1966).

Actually, there should be no question of indemnity over against Continental Grain Company, but it is submitted that the District Court should be so instructed on this point. Although there has been no opposition expressed to petitioners' plea for indemnity at any stage of this litigation, it is respectfully urged that this point should be clarified for purpose of the remand.

IV. Attorney's Fees And Expenses For The Appeal Should Be Granted In Favor Of Vessel-Owner And Charterer.

Finally, it is presumed by petitioners that the reversal of the District Court would not in any way affect the award for attorney's fees for the trial in favor of petitioners in that there has been no dispute as to this award on appeal. Petitioners would respectfully urge that the Court, however, apply the award of attorney's fees for the appeal in favor of petitioners and against Continental Grain Company.

The amount of attorney's fees was stipulated in the amount of $900.00 for the appeal, and it is respectfully submitted that such an award should be made by this Court. See, *Nicroli v. Den Norske Afrika-OG Australielinie Etc.*, 332 F.2d 651 (2nd Cir. 1964).

CONCLUSION.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

.....

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CERTIFICATE.

I hereby certify that a copy of the foregoing brief has been served upon opposing counsel of record by placing the same properly addressed into the United States Mail with adequate postage affixed thereto.

.....

APPENDIX A.

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION.

ERNEST O. DEFFES,
Plaintiff,

versus

FEDERAL BARGE LINES, INC.,
Defendant.

Civil Action No. 11113, Division "D".

JUDGMENT.

This cause came on for trial on January 20, 1964. After considering the testimony, pleadings, and reviewing the law, the Court is now ready to rule.

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants, Federal Barge Lines, Inc., and Gulf-Canal Lines, Inc., and that the plaintiff's suit be and the ame is hereby dismissed at his costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants, Federal Barge Lines, Inc., and Gulf-Canal Lines, Inc., against Continental Grain Company for

attorney's fees in the amount of TWENTY-FIVE HUNDRED AND NO/100 ($2500.00) DOLLARS, with interest from date of judgment until paid.

Dated at New Orleans, Louisiana, this 9 day of June, 1964.

ROBERT A. AINSWORTH, JR.,
(Robert A. Ainsworth, Jr.),
Judge, United States District Court.

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION.

ERNEST O. DEFFES,
Plaintiff,

versus

FEDERAL BARGE LINES, INC.,
Defendant.

No. 11113 Civil Action, Division D.

AINSWORTH, District Judge:

Plaintiff has sued Federal Barge Lines, Inc., owner of the Barge FBL 625, and Gulf-Canal Lines, Inc., bareboat charterer of the barge, for damages growing out of an injury he sustained while employed by Continental Grain Company as a grain handler in unloading the barge at a dock in the Port of New Orleans. Defendants have filed a third-party complaint against plaintiff's employer, Continental Grain Company, under the doctrine of *Ryan Stevedor. Co. v. Pan-Atlantic Steam. Corp.*, 350 U. S. 124, 76 S. Ct. 232 (1956). Plaintiff has been paid compensation in full for his injury by his employer, Continental, under the provisions of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C.A. 901, et seq.).

On May 27, 1960, plaintiff was working aboard the Barge FBL 625 unloading grain. He claims that while

on board he suffered an injury to his right eye from a piece of flying metal thrown from the marine leg used in the unloading operation, which resulted in industrial blindness to the eye. He alleges that the marine leg was defective which made the barge unseaworthy; that the barge owner and charterer failed to provide him with a safe place to work.

The Barge FBL 625 is a "hopper-type" barge of steel-welded construction with steel-rolling covers, 195 feet in length and 35 feet in breadth. It was loaded with a cargo of corn, but was a general classification barge capable of carrying any type of solid cargo. Continental had shipped the corn from St. Paul, Minnesota, to New Orleans under a freight bill and bill of lading in which Continental was both shipper and consignee. Continental loaded and unloaded the cargo.

The evidence showed that the marine leg, which plaintiff alleges caused his injury, is a shore-based elevating conveyor, owned and operated by Continental, used in unloading grain. It is permanently attached to the dock. It is equipped with a conveyor belt on which buckets are attached. The buckets scoop up the grain and carry it from the hold of the vessel to the shore. The unloading operation is divided into four phases. The first is the lowering of the leg into the hold and resting it on top of the grain. The leg remains, however, attached to and based on shore. The only contact which the leg has with the vessel is that it rests on the grain cargo, has

cables attached to the vessel for a period of time and during the sweeping-up operation rests on the bottom of the vessel. The raising and lowering of the leg is done with power furnished by a self-contained unit. Large scoops called "air buckets" are then removed from the leg. These "air buckets" are used to bring the grain from the ends of the barge to the centrally located marine leg. The buckets are operated by means of pulleys, one of which is fastened to the vessel and the other to the marine leg. The pulleys and the cables are part of the equipment of the leg. After the level of the grain is lowered the "air buckets," the pulleys and cables are removed and stored on the marine leg. The third phase of the unloading operation is performed with small bulldozers which do essentially the same task as the "air buckets," that is, bring the grain to the leg. The fourth and final phase is termed "sweeping up." The grain handlers sweep up the grain and shovel it into the marine leg. It was during this phase while plaintiff was shovelling corn into the marine leg that he claims he was injured.

It is settled law that a longshoreman injured while performing a "ship's service" can recover for unseaworthiness. *Seas Shipping Co. v. Sieracki,* 328 U. S. 85, 66 S. Ct. 872 (1946). A vessel is unseaworthy when it has a defect in its "hull, gear, stowage, and appurtenant appliances and equipment." *The Osceola,* 189 U. S. 158, 23 S. Ct. 483 (1903); *Mahnich v. Southern S.S. Co.,* 321 U. S. 96, 64 S. Ct. 455 (1944); *Grillea v. United States,* 2 Cir., 1956, 232 F. 2d 919.

An owner of a yessel may be liable for an unseaworthy condition which has been caused by an independent contractor and the doctrine has been extended to include equipment brought aboard and used and controlled exclusively by stevedores in loading and unloading a vessel. *Alaska Steamship Company v. Petterson,* 347 U. S. 396, 74 S. Ct. 601 (1954); *Rogers v. United States Lines,* 347 U. S. 984, 74 S. Ct. 849 (1954).

We now consider whether or not the Barge FBL 625 was unseaworthy. Plaintiff bears the burden of showing that the alleged defective equipment which caused his injury was a part of the ship's "hull, gear, stowage and appurtenant appliances and equipment." *Mosley v. Cia. Mar. Adra, S. A.,* 2 Cir., 1963, 314 F. 2d 223. He contends that the marine leg was defective and that this rendered the barge unseaworthy. He cites as authority in support of his contention *Petterson, supra,* and *Considine v. Black Diamond Steamship Corp.,* D. C. Mass., 1958, 163 F. Supp. 109. *Considine* would extend the warranty of seaworthiness, as applied to longshoremen, to any equipment aboard a vessel used in the traditional work of loading or unloading a vessel, regardless of what type or to whom it belonged. *Petterson* and *Rogers, supra,* did not go that far. In *Petterson* the defective equipment was a block of a type generally used by a vessel. In *Rogers* the injury was caused by the landfall runner rewinding on the winch drum of the vessel. In *McKnight v. N. M. Paterson & Sons, Ltd.,* 6 Cir., 1960, 286 F. 2d 250,

cert. denied 368 U. S. 913, 82 S. Ct. 189 (1961), and *Sherbin v. S. G. Embiricos, Ltd.*, D. C. E. D. La., 1962, 200 F. Supp. 874, the shipowner's warranty of seaworthiness was limited to equipment which was traditionally a part of a ship's appurtenant appliances and equipment. We concur, believing that the test enunciated in *McKnight* and *Sherbin* is the proper one here. Applying that test here, we find that the barge was not unseaworthy, for the marine leg is not equipment traditionally found aboard and used in unloading operations. This equipment was owned by the stevedore and not by the vessel. It was shore based and shore powered and had only a minimal contact with the vessel.

But plaintiff further contends that Continental's failure to furnish him with goggles for the protection of his eyes violated the Safety and Health Regulations for Longshoring, 29 C.F.R. § 9.1, et seq., thereby rendering the vessel unseaworthy under the authority of *Provenza v. American Export Lines, Inc.*, 4 Cir., 1963, 324 F. 2d 660. Violation of a safety regulation applicable to a stevedore does not render a vessel unseaworthy unless the violation creates a dangerous condition aboard the vessel, which would constitute a defect in the vessel's hull, gear, stowage and appurtenant appliances and equipment. See *Provenza v. American Export Lines, Inc., supra.* Failure of the stevedore to provide plaintiff with goggles did not create a dangerous condition which affected the vessel's hull, gear, etc. For Continental's negligence to be imputed to the shipowner, un-

der the facts here, it must be shown that it knew or should have known by the exercise of reasonable care of the stevedore's negligence. The evidence does not show that the shipowner knew of Continental's negligence. The FBL 625 is a dumb barge and was unaccompanied by any personnel at the time of cargo discharge. The vessel owner exercised reasonable care. It is sufficient here that the barge owner had a reputable firm loading and unloading the barge.

Judgment for defendants.

Original Signed ROBERT A. AINSWORTH, JR.,
United States District Judge.

New Orleans, Louisiana
May 6, 1964

APPENDIX B.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21868

ERNEST O. DEFFES,

Appellant,

versus

FEDERAL BARGE LINES, INC. and GULF-CANAL LINES, INC., ET AL,

Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

(May 26, 1966.)

Before JONES and THORNBERRY, Circuit Judges, and SLOAN, District Judge.

THORNBERRY, Circuit Judge: The plaintiff, a stevedore employed by Continental Grain Company (Continental), was injured while unloading grain from Barge FBL 625 which is owned by Federal Barge Lines, Inc. (Federal) and chartered by Gulf-Canal Lines, Inc. (Gulf). Plaintiff sued Federal and Gulf for damages, and the defendants filed a third-party complaint against Continental as the employer of the

plaintiff. The district court held for the defendants. 229 F.Supp. 719.

The injury resulted from an alleged defect in a marine leg, a mechanical elevator device, owned by Continental. The marine leg is basically a conveyor belt to which buckets are attached. It is permanently attached to the dock at all times and is designed for use in unloading grain from barges. The power for raising, lowering and operating the leg is supplied by shore-based facilities, and all the equipment used is owned by Continental.

The unloading operation is performed in four stages: (1) The marine leg is introduced through the open hatch of the barge into the grain, and grain is, in effect, "dug" out by the buckets on the conveyer belt. During this stage, there is no contact with the barge. (2) Large scoops, generally called "air buckets," operated by means of pulleys and cables, are utilized to bring the grain from the ends of the barge to the marine leg. The pulleys are attached to the barge at various places by means of hooks and are connected with the marine leg by cables. All this equipment is stored in the marine leg when not in use. (3) When the grain level has been lowered sufficiently, the air buckets are detached and stored and small bulldozers serving essentially the same purpose as the air buckets are brought into use. (4) The last phase of the process is the "sweeping up," during which stevedores sweep up the grain and shovel it into the marine leg. At this stage, the

marine leg rests on the bottom of the barge. The injury occurred during this last phase of the unloading.

Plaintiff claimed that a piece of metal from a worn bucket broke off and hit him in the eye. He received compensation from his employer, Continental, under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901. Plaintiff sought recovery against Federal and Gulf on the theory that the allegedly defective marine leg and the failure of Continental to supply goggles in compliance with the Safety and Health Regulations for Longshoring, 29 C.F.R. § 9.1, rendered the barge unseaworthy.

The district court noted that

> "an owner of a vessel may be liable for an unseaworthy condition which has been caused by an independent contractor and [that] the doctrine has been extended to include equipment brought aboard and used and controlled exclusively by stevedores in loading and unloading a vessel. Alaska Steamship Company v. Petterson, 347 U.S. 396, 74 S.Ct. 601, 98 L.Ed. 798 (1954); Rogers v. United States Lines, 347 U.S. 984, 74 S.Ct. 849, 98 L.Ed. 1120 (1954)."

Deffes v. Federal Barge Lines, Inc., E.D. La. 1964, 229 F. Supp. 719,721.

The court, citing *McKnight v. N.M. Paterson & Sons*, 6th Cir. 1960, 286 F.2d 250, cert. denied, 368 U.S. 913, and *Sherbin v. S.G. Embiricos, Ltd.*, E.D. La. 1962, 200 F.Supp. 874, found that the *Petterson* and *Rogers* cases involved equipment which was "traditionally a part of a ship's appurtenant appliances and equipment." *Ibid.* Since the marine leg was not "equipment traditionally found aboard and used in unloading operations," the court held that a defect in the marine leg would not cause the barge to be unseaworthy.

The court also concluded that a "violation of a safety regulation applicable to a stevedore does not render a vessel unseaworthy unless the violation creates a dangerous condition aboard the vessel, which would constitute a defect in the vessel's hull, gear, stowage and appurtenant appliances and equipment," and that the barge owner had discharged his duty of reasonable care by hiring a reputable firm to handle the loading and unloading of the barge. *Id.*, 721-22.

The basic question presented on this appeal is whether a defect in a shore-based marine leg can cause a barge to be held unseaworthy. Similar questions have been considered by several courts and have resulted in a sharp conflict between the circuits. The opinion of the district court relies on the Sixth Circuit decision in the *McKnight* case and is also supported by the Second Circuit's opinion in *Forkin v. Furness Withy & Co.*, 2d Cir. 1963, 323 F.2d

638. The opposite view has been espoused by the Ninth Circuit in *Huff v. Matson Navigation Co.*, 9th Cir. 1964, 338 F.2d 205, cert. denied, 380 U.S. 943, and by the Third Circuit in *Spann v. Lauritzen*, 3rd Cir. 1965, 344 F.2d 204, cert. denied, 34 L.W. 3201. After carefully considering these cases and the Supreme Court cases which have developed the doctrine of unseaworthiness, we conclude that the decisions of the Ninth and Third Circuits correctly state the law and that, therefore, the holding of the district court must be reversed.

The doctrine of unseaworthiness was conceived by the Supreme Court in *The Osceola*, 1903, 189 U.S. 158, as a device for imposing liability on ship owners for injuries to seamen. Since that time there has been a steady expansion of the scope and coverage of the doctrine. Thus, in *Seas Shipping Co. v. Sieracki*, 1946, 328 U.S. 85, 89, the Supreme Court considered the question "whether the shipowner's obligation of seaworthiness extends to longshoremen injured while doing the ship's work aboard but employed by an independent stevedoring contractor whom the owner has hired to load or unload the ship." The Court discussed at length the rationale of the doctrine and noted that

> "the hazards of marine service which unseaworthiness places on the men who perform it . . ., together with their helplessness to ward off such perils and the harshness of forcing them to shoulder alone the resulting personal disability and loss, have been

thought to justify and to require putting their burden, in so far as it is measurable in money, upon the owner *regardless of his fault* . . . . [T]he owner . . . is in position, as the worker is not, to distribute the loss in the shipping community which receives the service and should bear its cost.

* * *

"[T]his policy is not confined to seamen who perform the ship's service under immediate hire to the owner, but extends to those who render it with his consent or by his arrangement. All the considerations which gave birth to the liability and have shaped its absolute character dictate that *the owner should not be free to nullify it by parcelling out his operations to intermediary employers whose sole business is to take over portions of the ship's work or by other devices which would strip the men performing its service of their historic protection. The risks themselves arise from and are incident in fact to the service* . . . . [The owner's] ability to distribute the loss over the industry is not lessened by the fact that the men who do the work are employed and furnished by another. *Historically the work of loading and unloading is the work of the ship's service,* performed until recent times by members of the crew . . . . That the owner seeks to have it

> done with the advantages of more modern divisions of labor does not minimize the worker's hazard and should not nullify his protection.
>
> * * *
>
> "It seems, therefore, that when a man is performing a function essential to maritime service on board a ship the fortuitous circumstances of his employment by the shipowner or a stevedoring contractor should not determine the measure of his rights."

Id. at 93-97. (Emphasis added).

The Court also found that the stevedore's remedy for unseaworthiness against the shipowner was in addition to his statutory remedy against his own employer. *Id.* at 100-02.

The coverage of stevedores under the doctrine of unseaworthiness was further developed in *Alaska Steamship Co. v. Petterson* and *Rogers v. United States Lines, supra.* The stevedore's injury in *Petterson* was caused by a defective block which the Court assumed had been brought on board the ship by the stevedoring company. The Ninth Circuit found the vessel to be unseaworthy, *Petterson v. Alaska Steamship Co., Inc.*, 9th Cir. 1953, 205 F.2d 478, and the Supreme Court affirmed per curiam, citing *Seas Shipping Co. v. Sieracki, supra*, and *Pope & Talbot*

v. Hawn, 1953, 346 U.S. 406. In *Pope*, the Supreme Court had reaffirmed *Sieracki* and stated that "Sieracki's legal protection was not based on the name 'stevedore' but on the *type of work* he did and its relationship to the ship and to the historic doctrine of seaworthiness." *Id.* at 413. (Emphasis added.) The injured man in *Pope* was a carpenter who was repairing the loading apparatus and was hurt when he fell through an uncovered hatch hole.

The Third Circuit in *Rogers* was concerned with an allegedly defective land fall runner, a device used in unloading cargo. In its discussion, the court stated:

> "Admittedly then, the alleged unseaworthy condition was not created by the ship. The runner was owned, produced and fastened to the winch by Lavino [the stevedoring company], which was in charge of and performed the unloading operation. And there is no indication that the ship sanctioned its use or even knew of its existence. *The statement that the vessel adopted the runner as an appurtenance is simply not justified by the record* . . . . Since the wire alone or the manner in which it was handled, or both, caused plaintiff's hurts and since under the facts the presence of that wire cannot be construed as appellee's responsibility this judgment [for the defendant] should not, for the reas n urged, be disturbed."

Rogers v. United States Lines, 3rd Cir. 1953, 205 F.2d 57, 57-58. (Emphasis added.) The Supreme Court reversed per curiam. 347 U.S. 984. Three justices dissented in both the *Petterson* and *Rogers* cases on the theory that the doctrine of seaworthiness as stated in *Sieracki* should not be extended to cover "the unseaworthiness of equipment owned and brought on board by a stevedoring contractor . . ." since the stevedoring company would be better able to eliminate the hazard. 347 U.S. at 401-02.

The seaworthiness doctrine was further extended by the Supreme Court in *Gutierrez v. Waterman Steamship Corp.*, 1963, 374 U.S. 206. In that case, a longshoreman had slipped on beans spilled on the dock from defective bags during the unloading of cargo. The Court reiterated *Sieracki's* position that the "Seaworthiness is not limited, of course, to fitness for travel on the high seas; it includes fitness for loading and unloading," *id.* at 213, and found that the doctrine of seaworthiness applies to "longshoremen unloading the ship whether they are standing aboard ship or on the pier." *Id.* at 215.

Since the district court's opinion relies primarily on the decision in the *McKnight* case, we must first look to that case. McKnight, a longshoreman, was injured by unloading gear which was being lowered into the ship's hold by a shore-based crane. While the Sixth Circuit and the district court conceded that the plaintiff "might have been doing the traditional work of a seaman." (i.e., unloading cargo), both

courts concluded that "he was not incurring the hazards of a seaman, in that none of the traditional unloading gear of the ship, namely winches, masts, or booms, was being used . . . ." 286 F.2d at 251, 181 F. Supp. at 440. The courts distinguished the Supreme Court decisions in *Sieracki, Rogers* and *Petterson* on this basis but cited no case to support this distinction.

Our reading of the Supreme Court cases leads us to a contrary conclusion. Loading and unloading is clearly held to be "work of the ship's service." *Sieracki, supra; Crumady v. The Joachin Hendrik Fisser,* 1959, 358 U.S. 423, 427; *Italia Societa v. Oregon Stevedoring Co.*, 1964, 376 U.S. 215, 323. *Pope & Talbot v. Hawn, supra,* instructs us to look to the *type of work* performed to determine the extent of liability under the doctrine of seaworthiness. Here we have a claimant who was admittedly injured while unloading a cargo of grain. Therefore, there can be no doubt that he is within the scope of the doctrine.

The district court below and the *McKnight* case would exclude the plaintiff here from recovery because, although he was doing seamen's work, he was not incurring a seaman's hazard since he was not using gear traditionally found aboard ship. The Supreme Court in *Sieracki*, however, attempts to negate this type of limitation on the concept of seaworthiness. As stated there, the shipowner "is at liberty to conduct his business by securing the advantages of specialization in labor and skill brought

about by modern divisions of labor. He is not at liberty by doing this to discard his traditional responsibilities." 328 U.S. at 100. *McKnight* and the district court would permit the shipowner to escape liability merely by substituting a more modern method for performing the traditional work of a seaman. We can find no support in the Supreme Court cases for adopting such a position. Nor can we find a rational basis for drawing this distinction. If one is performing seamen's work, by definition he must be subjecting himself to a seaman's hazard, no matter what type of equipment he is using to do the work. "The risks themselves arise from and are incident in fact to the service . . . . ." *Sieracki, id.* at 95. If a seaman were injured in the engine room of a nuclear-powered vessel by some defect in the reactor, he could not recover under the rationale of *McKnight* and the district court, even though he was performing traditional seamen's work, because the shipowner had installed apparatus which had not traditionally been found on board ships. Such a result would be completely out of harmony with the Supreme Court's conception of the doctrine of seaworthiness.

The district court in *McKnight* found an additional basis for denying relief not used by the district court in the instant case. It concluded that the shore-based crane was not part of the hull, gear or stowage of the vessel, and, therefore, a defect in the crane or a fault in its operation could not make the ship unseaworthy. Again, the court cited no authority to support its conclusion. This reasoning also flies in the face of Su-

preme Court opinions. The Third Circuit attempted to draw the same distinction in the *Rogers* case. 205 F.2d at 57. The Supreme Court reversed per curiam. In the *Petterson* case, the Ninth Circuit assumed that the defective block belonged to the stevedoring company and that it has been brought on board by the stevedores. 205 F.2d at 479. The Supreme Court affirmed per curiam. The case at hand cannot be distinguished from the *Rogers* and *Petterson* cases on a rational basis. All three cases involved stevedore company equipment brought on board to assist in loading or unloading cargo. The mere fact that the marine leg is larger than a block (*Petterson*) or a land fall runner (*Rogers*) should not cause a different application of the law.

The courts in *McKnight* and *Forkin* attempted to draw further distinctions. They suggest that liability should not be imposed unless the injuring device is attached to or touching the ship. *McKnight*, 181 F. Supp. at 439 and n.9; *Forkin*, 323 F.2d at 641. This limitation finds no support in the Supreme Court cases. As stated by the Ninth Circuit in *Huff*, this approach is "manifestly wrong and contrary to the controlling decisions . . . ." 338 F.2d at 215. Even though it is admitted here that the marine leg at one stage in the process is attached to the barge and was at the time of the injury resting on the bottom of the barge, we join the Ninth Circuit in rejecting this purported exception to the doctrine of seaworthiness.

The opinions in *McKnight* and *Forkin* confuse the issue by introducing concepts of negligence into their

consideration of the seaworthiness question. They infer that the shipowner's power of inspection, 323 F.2d at 641, or his lack of control, 181 F. Supp. at 439, have relevance to the problem. This position, however, was clearly rejected by the Supreme Court when it stated in *Sieracki* that "liability is neither limited by conceptions of negligence nor contractual in character," 328 U.S. at 94, and when it concluded in *Mitchell v. Trawler Racer, Inc.*, 1960, 362 U.S. 539, that "we can find no room for argument as to what the law is. What has evolved is a complete divorcement of unseaworthiness liability from concepts of neligence."

Several months after judgment was rendered below, the opinion of the Ninth Circuit in *Huff v. Matson Navigation Co.*, 9th Cir. 1964, 338 F.2d 205, was handed down. Huff was also injured by the operation of a marine leg. The Ninth Circuit made a very thorough analysis of the Supreme Court cases and the decisions of the Sixth Circuit in *McKnight* and the Second Circuit in *Forkin*. It found the distinction drawn in *McKnight* that the longshoreman was not incurring a seaman's hazard because the gear was not that traditionally used in unloading to be invalid. The Court concluded that the shipowner's absolute liability

> "for the results of defects in unloading equipment brought on board ship by the stevedoring company should not be qualified or modified if the unloading equipment thus used happens to be newly designed and devised and involves none of the traditional un-

> loading gear of the ship. Use of more modern equipment can no more exculpate the shipowner from his obligations than could use of 'more modern divisions of labor.' [Sieracki]. It would seem passing strange of the shipowner, whose obligation of seaworthiness, as stated in Sieracki, 'is peculiarly and exclusively the obligation of the owner . . .,' could in effect delegate and avoid his obligation by employing a stevedoring company which used newly invented unloading devices."

The Third Circuit in *Spann v. Lauritzen*, 3rd Cir. 1965, 344 F.2d 204, followed *Huff* and extended its holding considerably. The defective equipment in that case was a hopper located *on the pier*. A shore-based crane would scoop buckets of nitrate from the hold of a ship and empty them into the hopper. Trucks would drive under the hopper and a lever would release the contents of the hopper into the truck bed. The plaintiff was injured when a defective release mechanism caused the lever to descend prematurely and strike him. The Court agreed with the conclusion of the "Ninth Circuit in the *Huff* case that *McKnight* and *Forkin* are out of harmony with the principles announced by the Supreme Court" and allowed the plaintiff to recover. *Id.* at 209.

The analysis of *Huff* and *Spann* and the failure of the lower court and the courts in *McKnight* and *Forkin* to demonstrate a valid distinction as a basis

for a limitation on the broad doctrine of seaworthiness as enunciated by the Supreme Court convinces us that a defective marine leg used in unloading grain makes a barge unseaworthy. Because of this conclusion, we find it unnecessary to consider the appellant's other contentions.

The judgment of the district court is reversed and the case is remanded for proceedings not inconsistent with this opinion.

Federal and Gulf, appellees, and Continental, third party defendant-appellee, have stipulated that in the event attorneys fees for the appeal of this case are awarded in favor of Federal and Gulf and against Continental, the amount should be set at $900. Since this case is being reversed and remanded, the District Court will have before it such stipulation for whatever action it deems appropriate.

JONES, Circuit Judge, Dissenting

In the opinion of the majority, it is shown that:

> "The injury resulted from an alleged defect in a marine leg, a mechanical elevator device, owned by Continental. . . . It is permanently attached to the dock. . . . The power for . . . operating the leg is supplied by shore based facilities. . . . The injury occurred during this last phase of the unloading."

The end of the marine leg rested on the bottom of the barge. I do not see how it became a part of the barge merely by touching it.

I see no reason for this extension of the doctrine that a longshoreman is a seaman and equipment affixed to the shore is a part of a vessel. I would relegate the appellant to the remedy provided by the Longshoreman and Harbor Workers Compensation Act rather than impose a liability for negligence upon his employer by way of indemnity of the ship owner. Therefore, I DISSENT.

APPENDIX C.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1965

No. 21868

D. C. Docket No. 11113-Civil Action

ERNEST O. DEFFES,

Appellant,

versus

FEDERAL BARGE LINES, INC. and GULF-CANAL LINES, INC., ET AL.,

Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before JONES and THORNBERRY, Circuit Judges, and SLOAN, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered and adjudged that the appellees, Federal Barge Lines, Inc. and Gulf-Canal Lines, Inc., and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

JONES, Circuit Judge, dissents.

Issued as Mandate: May 26, 1966

APPENDIX D.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21,868

ERNEST O. DEFFES,
Appellant

v.

FEDERAL BARGE LINES, INC. and GULF-CANAL LINES, INC., ET AL,
Appellees

Appeal from the United States District Court for the Eastern District of Louisiana

ON PETITION FOR REHEARING

(July 6, 1966)

Before JONES and THORNBERRY, Circuit Judges, and SLOAN, District Judge.

PER CURIAM:

It is ORDERED that Appellees' petition for rehearing in the above entitled and numbered cause be, and the same is hereby DENIED.

JONES, Circuit Judge, I dissent.